2. James Doering

Another complainant and informant against and competitor of Kay, James Doering, has also been demonstrably shown to have engaged in disqualifying behavior. Nonetheless, the Bureau has taken no action whatsoever against him. On May 30, 1997, United Corporation of Southern California ("UCSC") and Kay jointly filed a *Formal Complaint* against Doering and Pick. Attachment 5. Other than their joint participation in this complaint, UCSC and Kay are not otherwise affiliated. The *Formal Complaint* demonstrated conclusively that Doering had, *inter alia*, filed with the FCC an assignment of license application which he knew or should have know contained false statements and falsified documents. Specifically, the application included an FCC Form 1046 by which Robert L. Springfield, the President and sole shareholder of UCSC, was purported to have executed on September 19, 1995, and designating "Jim Doering d/b/a J. Doering Communications" as the assignee. The assignment application also included a certification letter with a conformed signature, the original ostensibly having been signed by Springfield on September 20, 1995.

Springfield was out of the country on a cruise on the dates that he purportedly signed the FCC Form 1046 and the certification of construction. He never saw, reviewed, or signed anything like the certification letter, and in fact had no personal knowledge of most of the statements attributed to him therein. He had once much earlier signed an FCC Form 1046 with the intention of, assigning his station to Harold Pick subject to a specified business arrangement, but Pick never filed the application. He never signed anything assigning the license to Doering, nor did he have any agreement or understanding with Doering. Indeed, until shortly before he filed the *Formal Complaint*, Springfield had never met or heard of Jim Doering. Nonetheless, Doering filed and prosecuted the application, falsely representing it to be a voluntary assignment

of the license from UCSC to Doering. Doering knew this was not the case, and he also knew or should have known that the application contained false statements and forged or falsified documents.

Although not required to do so prior to service by the Bureau, Doering responded to the complaint, but he was unable to deny any of the operative facts. He essentially admits that he inserted his name as assignee and the false execution date on a Form 1046 *after* it had been signed by Springfield in blank. He does not dispute Springfield's statement that he never saw nor signed the certification letter and had no knowledge of the representations contained therein, but pleads ignorance at how such a falsified document came to be included in his application. Notwithstanding the conclusive evidence presented in the complaint and Doering's inability to deny it, the Bureau has taken absolutely no action against Doering. The Bureau has not even formally served the complaint. Meanwhile, on information and belief, Doering has entered into an agreement with Nextel to sell by cancellation[10] the authorization he wrongfully and fraudulently converted from UCSC.

The Bureau has feebly defended that "[t]he complaint has not been served upon the defendants because the complaint is undergoing review in the normal course of business." *Bureau's Sobel Opposition* at ¶ 22. This claim is dubious on its face. The Bureau has not even served the complaint which has been pending for over a year. This can hardly be considered "the normal course of business." There has been more than ample time for the Bureau to determine whether the complaint is of sufficient substance to warrant its service upon the complainants and a request for an answer. It is not credible that the Bureau could be engaging in any meaningful "review" of the complaint without a formal answer. Apparently, the Bureau's investigatory

[10] In the Part 90 radio services where channels are often shared by multiple licensees in the same area, one licensee may, rather than purchasing a co-channel authorization, simply contract with the co-channel licensee to cancel its authorization, thereby freeing up capacity on the channel and possibly giving the remaining licensee exclusive status.

obligations and statutory duties are applicable only when Kay or Kay's associates are accused of wrongdoing--the Bureau has the luxury of never reacting to conclusive evidence of wrongdoing by Kay's enemies.[11]

Doering is given free reign to steal licenses, misrepresent, and falsify applications right under the Bureau's nose, and then negotiate with Nextel for potential profit on his ill-gotten goods. The only apparent explanation for such preferential treatment is that Doering is willing to say the bad things about Kay that the Bureau wants to hear.

3. Liberty Paving, Inc.

On January 10, 1997, Sobel wrote to the Bureau regarding a co-channel licensee, Liberty Paving, Inc. ("Liberty"). Attachment 6. Sobel informed the Bureau that Liberty's facility had discontinued operation and had been off the air for more than a year, and he requested its cancellation in accordance with 47 C.F.R. § 90.157. Sobel presented conclusive evidence supporting his contention, namely, a transcript of a deposition in which Charles F. Barnett, President of Liberty, testified under oath that the radios his company had been using pursuant to the license were taken out of service in the fall of 1994. In August of 1994 Liberty contracted for service on Nextel's new 800 MHz digital system. Liberty traded the old radios in for a credit of $100 each. The old radios were taken away by the technicians who installed the new Nextel radios in Liberty's vehicles. Mr. Barnett further testified that his company has not used the old radios or any radio system other than Nextel's since that time. Mr. Barnett's service with Nextel began sometime in August-September of 1994.

[11] The Bureau makes the irrelevant assertion that "Mr. Doering is not on the Bureau's list of contemplated witnesses in the Kay proceeding, so his credibility is not at issue in that proceeding." *Bureau's Sobel Opposition* at ¶ 22. Once again, this is irrelevant. The fact is that Doering has assisted the Bureau as an informant and complainant against Kay, and the Bureau now appears to be rewarding him for that assistance by ignoring compelling evidence of improper conduct on his part. This can not be squared with the Bureau's treatment of Kay.

Sobel had thus presented the Bureau with an open-shut case of automatic cancellation pursuant to Section 90.157 of the rules, and Sobel was entitled to have the Liberty authorization canceled and purged from the database. Nine months later the Bureau had taken no action, so on September 2, 1997, Sobel renewed his request. Attachment 7. Both of Sobel's letters remain unanswered to this day. Moreover, on information and belief, Barnett has engaged in discussions regarding possible sale of the authorization.

The Bureau has no real answer for this. It states only that "Sobel's request is being reviewed and will be decided in the normal course of business." *Bureau's Sobel Opposition* at ¶ 23. But this is absurd. There is nothing to review. Barnett admitted under oath that the station was long ago abandoned, and he has not opposed Sobel's request that it be deleted. It does not take more than a year to resolve such a simple matter. The Bureau's refusal to cancel the Liberty Paving license and delete it from the database, an action mandated by the rules[12] and factually justified by Barnett's own sworn testimony, while allowing Liberty Paving to negotiate for the sale of the invalid authorization, is tantamount to paying Barnett to testify against Kay.

Barnett has been identified by the Bureau as one with information regarding alleged wrongdoing by Kay and as a potential witness against Kay. But the Bureau is concerned less with Barnett's candor than his willingness to implicate Kay. Attachment 8 is an excerpt from the transcript of a recent deposition of Barnett in connection with WT Docket No. 94-147. Barnett admits that he lied when he wrote to the Bureau telling them he had a tape recording in which

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[12] Section 90.157 of the Commission's Rules and Regulations (Discontinuance of station operation) provides in pertinent part:

> (a) The license for a station *shall cancel automatically upon permanent discontinuance* of operations and the licensee shall forward the station license to the Commission. ...
>
> (b) For the purposes of this section, *any station which has not operated for 1 year or more is considered to have been permanently discontinued.*

47 C.F.R. § 90.157 (emphasis added).

Kay allegedly incriminated himself. Barnett further admits that he made the false statement for the express purpose of possibly influencing the Commission to reinstate his previously canceled license.

Specifically, Mr. Barnett testified as follows:

Q. Did you write this letter?

A. [by Mr. Barnett] Yes, I did.

Q. Did you type this letter?

A. Yes, I did.

Q. The signature at the bottom, is that your signature?

A. Yes, it is.

Q. I would like to refer you to a sentence approximately seven lines down from the top of the first paragraph. I'll read a portion of the sentence. "I have in my possession a taped phone conversation between Mr. Kay and myself when I first was made aware that my current carrier 'Fleetcall' had not assigned my radio service to Mr. Kay's company." You drafted that sentence, correct?

A. Yes, I did.

Q. Do you have possession of a taped phone conversation between Mr. Kay and yourself?

A. No, I don't.

Q. Have you ever taped a phone conversation between yourself and Mr. Kay?

A. No, I haven't.

Q. Then it's not unfair for me to state that this statement is untrue?

A. The statement is untrue.

Q. Why did you make that statement knowing that it was untrue?

A. Well, prior to writing this letter I had received a letter from the FCC telling me that I was going to have my license reinstated. After I received the letter I received a copy of the petition that this Mr. Kay's attorney sent to Washington or Gettysburg still fighting the issue, and I thought that if I was still in the balance whether I was going to get my license back or not and if a tape recording could make a difference that would be absolutely pivotal, I was willing to try to get a tape recording from Mr. Kay that he would repeat some of the things he had told me already on the phone.

Attachment 8, *Transcript* at pp. 9-11. It is preposterous that the Bureau should ignore such blatant and disqualifying dishonesty in its choice of witnesses. It is clear, however, that the Bureau is concerned not with honesty or the truth, but merely with "getting" Kay. Judged by that standard, Barnett is apparently highly qualified in the eyes of the Bureau.

4. Christopher C. Killian

Christopher C. Killian ("Killian") is yet another Kay competitor who complained against and informed on Kay, and who has been named by the Bureau as a potential witness against Kay. The Bureau in this proceeding charges that Sobel transferred control of his 800 MHz stations to Kay without prior authority, and that he attempted to conceal this fact from the Commission. The Bureau has been presented with evidence, much more compelling than any offered against Kay, that Killian lacked candor with Commission. He concealed his role as a real party in interest in an application submitted by his wife, with the purpose of obtaining more channels than he was entitled. The Bureau continues to ignore this as it uses Killian as a witness against Kay.

A review of Commission records will show that Chris Killian, in 1993, made application in the name of Carrier Communications, requesting authorization for the frequencies 851.2375 and 854.1625 MHz at Mount Adalaide, near Bakersfield (Kern County) California. It appears that the application was originally filed in late 1992 or January of 1993, was returned by the Commission, and then resubmitted by Chris Killian in June of 1993, whereupon it was processed and granted by the Commission, resulting in the issuance to Carrier Communications the

authorization bearing call sign WPCM497. Attachment 9. We shall hereafter refer to this application as the "Carrier Communications Application" and to the resulting authorization as the "Carrier Communications License."

A further review of the Commission's records will show that on or about the same date that the above-described Carrier Communications application was originally filed, another application was filed in the name of Deborah Killian. This application requested authorization for the frequency 851.6125 MHz, also at Mount Adalaide, near Bakersfield (Kern County) California. The Commission processed and granted this application, resulting in the issuance to Deborah Killian the authorization bearing call sign WPCE285. Attachment 10. We shall hereafter refer to this application as the "Deborah Killian Application" and to the resulting authorization as the " Deborah Killian License."

The business address for Carrier Communications is 42326 Tenth Street West, Lancaster, California, 93534, and this is the address that was used in the Carrier Communications Application. The address used in the Deborah Killian Application was 44349 Lowtree, Suite 163, Lancaster, California 93534. Upon information and belief, this address was at the time merely a mail drop. Deborah Killian is the spouse of Chris Killian. This relationship was not disclosed anywhere in either the Deborah Killian Application or in the Carrier Communications Application.

Upon information and belief, Carrier Communications was not, at the time of these applications, a corporation or a partnership, but rather a sole proprietorship owned by Chris Killian and/or an unincorporated business owned jointly by Chris and Deborah Killian. Nevertheless, the proper procedure was not followed in filling out the FCC Form 574 used for the Carrier Communications application, in that the applicant name was given as "Carrier Communications" rather than as "Chris Killian, DBA Carrier Communications." *See* FCC FORM 574 INSTRUCTIONS, Item 21, page 22 (August 1989).

Deborah Killian testified, under oath, at a deposition in which she was questioned regarding the Deborah Killian License. A copy of the transcript is appended hereto as Attachment 11.

The pertinent parts of here testimony are as follows:

Q: Do you hold any FCC licenses?
A: I believe I hold one.
Q: What do you use that one for?
A: I don't know, I just have my name on the license.
Q: Is that something you did for your husband's business?
A: Yes.

Killian Deposition Transcript at p. 11.

Q: So far as you know, the only place your name appears with regard to Carrier Communications is on the one FCC license?
A: That's correct.
Q: Carrier Communications uses that license in the business, is that correct?
A: I don't know.

Killian Deposition Transcript at p. 21

Q: So you have never read ... any of the FCC rules, you don't keep around the FCC rule book or anything like that?
A: No, I don't.

Killian Deposition Transcript at p. 23

Q: Let's see now. The radio station that we have discussed earlier that is in your name, do you know if anybody manages that particular station?
A: I know nothing about that.
Q: You don't know who it is that manages it; correct?
A: That's correct.
Q: You don't know whether or not it is pursuant to a written contract or oral contract; is that correct?
A: That's correct.
Q: You don't even know where the contract is, correct?
A: That's correct.
Q: You don't even know whether or not a contract at all exists; is that correct?
A: That's correct.
Q: Who would know these things?
A: I would imagine my husband, Chris.
Q: If somebody was in possession of any contracts about that particular station and knew where the documents would be, it would be Chris?
A: Chris.

Q: I would imagine from what you know that with regard to that particular station, you don't know whether it has been constructed, when it has been operated, or any of the details of it?
A: I know no details about it, no.
Q: You don't know whether it has been constructed?
A: I don't know.
Q: You don't know whether or not it is operating; is that correct?
A: That's correct.

Killian Deposition Transcript at pp. 26-27.

It is clear from the foregoing that Chris Killian has intentionally misrepresented material facts to the Commission, intentionally concealed material facts from the Commission, and otherwise lacked candor with the Commission. He obtained the Carrier Communications License by means of this fraudulent conduct. Upon information and belief, Chris Killian d/b/a Carrier Communications would not have been eligible for the two channels requested at Mount Adelaide in the Carrier Communications Application if it had, at the same time, held an authorization for or been an applicant for the third channel requested at Mount Adelaide in the Deborah Killian Application. Accordingly, Chris Killian had the Deborah Killian Application prepared in his wife's name and used an address other than his normal business mailing address. He departed from accepted procedures in giving the applicant name in the Carrier Communications Application so as to make it less likely that the two applications would be connected. Finally, he failed to disclose that he was the real party in interest in the Deborah Killian Application.

As a result of this fraud on the Commission Chris Killian obtained the Carrier Communications License, a valuable asset which he subsequently sold to Nextel Communications for a substantial sum of money. Attachment 12 is a copy of the application (FCC Form 490) for Commission consent to the assignment of the Carrier Communications License from "Carrier Communications and Electronics" to Smart SMR of California, a wholly-owned subsidiary of Nextel Communications, Inc. Attachment 13 is a reference copy of the resulting authorization. Kay does not know the price paid by Nextel, but based on his knowledge

of the industry, he estimates that Chris and/or Deborah Killian received, or have contracted to receive, between $50,000 and $100,000 for the Carrier Communications License, and quite possibly more. Insofar as the authorization was obtained by means of misrepresentation and lack of candor which the Bureau refuses to sanction, and insofar as the Killian matter is but one in a host of examples of the Bureau pulling regulatory punches in favor of informants and witnesses against Kay, it is not too far fetched to characterize the Bureau's conduct as payment to Killian for testifying against Kay.

The foregoing information was presented to the Bureau more than seven months ago, but the Bureau has taken no enforcement or corrective action. Notwithstanding the clear evidence that Killian misrepresented, lacked candor, and concealed the fact that he was the real party in interest in the Deborah Killian Application, the Bureau remains content to ignore the matter, leave his unjust enrichment received from Nextel intact, and to use him as a witness against Kay.

Rather than squarely answer this charge of obvious favoritism, the Bureau bemoaned the fact that Kay waited until eight months after an assignment of Killian's licenses to Nextel. *Bureau's Sobel Opposition* at ¶ 24. This misses the point. Kay was not challenging the assignment to Nextel as such; rather, he was challenging Killian's overall qualifications as a result of the irrefutable evidence of improper conduct. Kay was seeking disqualification and revocation against Killian, so the timing of the submission is not really relevant. It is suspiciously convenient for the Bureau to defer taking any action on documented and conclusive disqualifying misconduct by Killian--misconduct that Killian has never stepped forward to deny--while continuing to use Killian as a witness against Kay. What effect this has on Killian's credibility is, of course, an issue to be resolved in the Kay proceeding. In this context, however, it is further evidence of favored treatment being afforded to anyone who will take the stand against Kay.

The Bureau's objection that it has only a short time (now more than seven months) since the Kay pleading is an equally inadequate answer to the discriminatory situation represented by this matter. In June of 1996, long before Kay filed his pleading, and well before Killian's assignment of his authorization to Nextel, the Bureau was presented with a finder's preference request by Applied Technology Group, Inc., which contained a showing that Killian's station had not been timely constructed and that the authorization was no longer valid. *See* FCC Compliance File No. 96F215, Attachment 14, *Petition for Institution of License Revocation Proceedings*, Exhibit 6. The Bureau ultimately dismissed the finder's preference request, but not on its merits, but rather on the procedural grounds that the frequencies involved were no longer subject to the finder's preference program. *Id.* The Bureau nonetheless never followed up on the information presented to it that Killian had never constructed his station. The Bureau later processed and granted the assignment of the authorization to Nextel without demanding the certifications of timely construction typical in such applications. It would thus appear that Bureau's claimed "obligation" to *sua sponte* investigate matters upon receipt of information and its claimed "statutory obligation" not to grant applications if it has information preventing the requisite Section 308(a) finding, *see Bureau's Sobel Opposition* at 14, are things the Bureau applies rigidly to Sobel but conveniently ignores when it comes to Kay's enemies. But what we clearly see, yet again, is another example of the Bureau ignoring and violating its own rules and its statutory obligations, and thereby permitting a witness against Kay to be unlawfully enriched by the sale of an invalid authorization.

C. THE BUREAU'S PREJUDGMENT OF KAY

Alleged complaints to the FCC regarding Kay were the ostensible basis for the Bureau's initiation of an investigation of Kay. The Bureau's January 31, 1994, Section 308(b) request to Kay (Attachment 15) began: "The Commission *has received complaints* questioning the construction and operational status of a number of your licensed facilities. ... In addition, the Commission *has also received complaints* questioning the actual loading and use of your facilities. The *complaints allege* that the licensed loading ... does not realistically represent the actual loading ..., thereby resulting in the warehousing of spectrum." Attachment 15 at p. 1 (underlined emphasis in original; italicized emphasis added). The alleged complaints were submitted on an *ex parte* basis by parties whom the Bureau knew to be biased against Kay.[13]

Even after the Bureau had ostensibly investigated Kay, it recommended to the Commission a hearing designation order seeking license revocation that was still based almost exclusively on unverified complaints from biased sources. The *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, instituting the Kay license revocation was based in significant part on "complaints from other licensees," 10 FCC Rcd 2062 at ¶ 1 (1994). The Commission characterized these as "a number of *complaints* regarding the construction and operation of a number of Kay's licensed facilities," as "*reports* that Kay may not have constructed, or may have deconstructed a number of stations," and as "*complaints from competitors* alleging that Kay is falsely reporting [loading]." 10 FCC Rcd 2062 at ¶ 2 (emphasis added). Indeed, the Bureau admitted that it lacked supporting evidence for any of the issues other than the charge that Kay violated Section 308(b).

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[13] The identities of complainants were disclosed in the *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* submitted on March 8, 1995 in WT Docket No. 94-147. Most of the complaints were from competitors of Kay who would obviously be biased against him. A handful of "interference complaints" were from users of the competitors' systems, but these, on their face, describe nothing more than the co-channel congestion typical of shared-frequency Part 90 systems.

In the second paragraph of the letter the Bureau acknowledged that these mere allegations were the basis for the Section 308(b) request: "*Based on these allegations*, we need more information to determine whether you are qualified to be a Commission licensee." *Id.* (emphasis added). The letter ends with the admonition: "Your attention is directed to Title 18 of U.S.C. Section 1001, in which Congress has determined that a wilful false reply to a letter of this type may result in fine or imprisonment." *Id.* Having not previously communicated any complaint or concern to Kay, then, the Bureau in its initial letter to him advised him that, based solely on unproved allegations--allegations that were unsubstantiated, unverified, from known biased sources, and in complaints that were not served on Kay even though some of them related to or had a direct bearing on pending contested matters. On that basis alone, the Bureau was already placing in issue Kay's basic qualifications. The Bureau, in its first communications to him, and without even awaiting any sort of response, felt it necessary to threaten him with criminal prosecution should he lie. This was not the tone of an impartial investigator, but rather that of a self-appointed hanging judge who had already decided the guilt of the accused. The Section 308(b) letter was an after-the-fact formality.

The Bureau denies that the harsh and brutal tone of its initial communication to Kay indicates that it had already prejudged Kay before it sent the Section 308(b) request. *Bureau's Sobel Opposition* at ¶ 24. The Section 308(b) contained language placing Kay's basic qualifications in issue and threatening him with criminal prosecution. The Bureau attempts to understate the significance of this: "As a matter of standard practice, whenever an investigation could potentially affect a licensee's qualifications, 308(b) letters issued by the Enforcement and Consumer Information Division of the Bureau routinely contain that language." *Id.*

The Bureau offers no evidence to support this statement, *i.e.*, examples of Section 308(b) letters in which the Bureau forcefully questions the qualifications of a licensee and threatens criminal prosecution based solely on complaints, and prior to any attempt to informally

communicate with the target regarding the complaints.[14] The letter here in question was not issued by the Enforcement and Consumer Information Division of the Wireless Telecommunications Bureau, but rather by the Licensing Division of the Private Radio Bureau. The letter is atypical, at least in the experience of Kay and Sobel.

By way of comparison, neither of the two 308(b) requests sent by the Bureau to Sobel on January 19, 1996 (Attachment 18), and on June 11, 1996 (Attachment 19), contained any such language. This means either that the Bureau's assertion that such language is typical is a misrepresentation, or that the Bureau in fact did not consider Sobel's qualifications to be at issue, a point which they now vehemently deny. This is interesting. The Bureau claims that it had questions regarding Sobel's qualifications as 1994 when the *HDO* was adopted in this proceeding, and yet, in January of 1996 and again in June of 1996 the Bureau consciously chose *not* to include in Section 308(b) requests to Sobel language that it now claims it routinely includes "[a]s a matter of standard practice, whenever an investigation could potentially affect a licensee's qualifications."

The Bureau grossly understates the aggressive nature of the letter. The letter did not merely advised Kay that the "investigation could potentially affect [his] qualifications," *Bureau's Sobel Opposition* at ¶ 26; rather, it forcefully stated: "Based on these allegations, we need more information to determine whether you are qualified to be a Commission licensee." Attachment 15, p. 1. Thus, the Bureau had already made at least a prima facie determination that Kay was unqualified, based on nothing more than unsupported and conclusory allegations from biased

[14] Attachment 16 is a copy of a representative Section 308(b) letter, typical of many Kay had seen over the years. It is cordial in tone. It does not challenge the licensee's qualification, nor does it threaten the licensee with criminal sanctions. Attachment 17 is a follow-up sent when the licensee failed to respond to the first Section 308(b) letter. Again, this is typical of many Kay had seen over the years. It also takes a cordial tone and does not result to judgmental language or ominous threats. When this is compared to the Section 308(b) request sent to Kay, it is clear that the Bureau had already prejudged the matter before sending the letter.

competitors and enemies of Kay. The Bureau argues, however, that there is nothing improper in its reliance on information received from competitors in discharging its enforcement duties, and it quotes a pleading by undersigned urging that competitors had standing to intervene in FCC licensing proceedings as "private attorneys general."[15] *Bureau's Sobel Opposition* at ¶ 27. But it is absurd to jump from the accurate premise that a competitor's private economic interest gives it standing in a Title III licensing proceeding to the unlawful conclusion that the Bureau may form judgments and come to conclusions (even if only preliminary) as to the qualifications of a licensee based solely on unsupported and conclusory allegations from biased competitors. In the "private attorney general" cases referred to, the licensees had the opportunity to confront and respond to Section 309 challenges to their applications and Section 402(b) appeals from their license grants. But the Bureau had already formed judgments that Kay's qualifications were at issue before Kay even knew the identity of the informants against him or the content of their complaints.

[15] The theory is that while an administrative agency such as the Commission deals only in the public interest, and does not adjudicate disputes involving purely private interests, a party's private interest may nonetheless give it standing to intervene in and appeal from rulings in agency licensing proceedings. This can assist the agency in its enforcement activities because competitors have an incentive to expose potential wrongdoing that might not otherwise come to the agency's attention. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940), *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1941), *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30-31 (D.C. Cir.), Such private sector intervenors are referred to a "private attorneys general," *Association of Data Processing Service Organizations. v. Camp*, 397 U.S. 150, 153 n.1 (1970), or sometimes as a "King's proctor." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 28 (D.C. Cir. 1941).

D. THE BUREAU'S IMPROPER EFFORTS TO INTERFERE WITH KAY'S BUSINESS

1. Improper Use of Section 308(b) Request

As noted above, the Section 308(b) request the Bureau sent to Kay was suspect on its face and is itself evidence that the Bureau had already prejudged Kay. It was also improperly used by the Bureau as a weapon against Kay.

The scope of the Section 308(b) request was extremely broad and requested highly sensitive proprietary information, including Kay's entire customer list. Kay was concerned that if he provided this information to the Bureau, it would find its way into the hands of his competitors. Even if the Bureau did not release the information directly to the competitors, which, based on other actions of the Bureau described below, was a reasonable possibility, if not a likelihood, the competitors might obtain the information pursuant to FOIA requests. Nonetheless, the Bureau repeatedly refused Kay's requests for assurances that information provided would be kept confidential. Frustrated, Kay began placing copyright notices on his submissions to the Bureau. This prompted the Bureau to demand 50 copies of the information that Kay was to provide in response to the Section 308(b) request.

The Bureau's refusal to give Kay assurances of confidentiality, coupled with the request for 50 copies of competitively sensitive information, convinced Kay that the Bureau intended to reveal any information he provided to his competitors. This was not unjustified paranoia on Kay's part; rather, it was a reasonable apprehension confirmed by other actions of the Bureau. Shortly after the Kay received the Section 308(b) request, he learned that several of his competitors and customers were already aware of it. He later learned that the Bureau had improperly and secretly distributed the Section 308(b) request to several of Kay's competitors, customers, and potential customers. This definitely had the effect of damaging Kay's reputation and hurting his business, and this may well have been the Bureau's intention.

Although signed by Hollingsworth, the Section 308(b) request was actually written by Ms. Anne Marie Wypijewski ("Wypijewski), a Bureau staff attorney stationed in Gettysburg who worked closely with Hollingsworth. Attachment 20 are copies of transmittal letters whereby, on January 31, 1994, Wypijewski sent copies of Kay's Section 308(b) request to Cornelia Dray, Gary Van Diest, Dr. Michael Steppe, Mr. Edward Cooper, Harold Pick, and Christopher C. Killian. Each of these persons was a competitor, customer, potential customer, and/or co-channel licensee with Kay. As noted above, one or more of them immediately began spreading false accusations about Kay around the Los Angeles mobile radio community, using the FCC letter conveniently supplied by Wypijewski. This also, of course, placed these individuals on notice of the specific information that was being requested of Kay. All they had to do was sit back and wait until the information was filed, and then request it under FOIA. Any fair minded observer must ask why it was more important to the Bureau that Kay's enemies be kept apprised of each step of the investigation against Kay than it was for the Bureau to seek corroboration of the claims of biased accusers before rushing to judgment against Kay.

The Bureau dismisses this, hiding behind the technicality that this was not a restricted proceeding and arguing that the Bureau therefore did not violate *ex parte* rules by releasing the letter. *Bureau's Sobel Opposition* at ¶ 30. The complaints against Kay did not become restricted proceedings only because the Bureau unilaterally chose not to serve copies of the complaints on Kay. The Bureau conveniently deflects the charge by relying on a decision that was exclusively within the Bureau's control.[16] While the Bureau may have the discretion to keep the identity of informants confidential, Kay respectfully submits that this discretion should be exercised with a great deal of circumspection when the so-called "informants" are actually business competitors who stand to have their personal interests significantly enhanced by getting another licensee in

trouble. The Bureau conveniently ignores the fact that the chief complainants against Kay were competitors who would directly benefit from a Commission action withdrawing any of Kay's authorizations. Such action would (a) remove encumbrances from the complainants' own authorizations, (b) free the channel for possible application by the complainants', and/or (c) remove or diminish competition from Kay. In these circumstances the Bureau had a public interest duty not to hide behind technicalities, and it was certainly improper for the Bureau to choose sides and allow itself to be used as a weapon in this competitive skirmish.

The Bureau claims that it sufficiently assured Kay of confidentiality when Hollingsworth stated in one of his letters to Kay that "materials which include any information containing trade secrets or commercial, financial, or technical data that would customarily be guarded from competitors, will not be made routinely available to the public." *Bureau's Sobel Opposition* at ¶ 29. What that meant, however, is that the information would be subject to possible FOIA requests by Kay's competitors.[17] The Bureau, by sending blind copies of the Section 308(b) letters, alerted Kay's competitors and enemies and advised them specifically what information was being requested, making it a simple matter for them to submit FOIA requests seeking it. Kay thus reasonably feared that the Bureau had set the stage for his competitors to obtain his customer list, solicit his customers, and destroy his business. And, if the Bureau decided in response to such a FOIA request to release the information over Kay's objection (assuming the Bureau even bothered to inform Kay of the request), there would be little Kay could do to prevent the ultimate release of the information.

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[16] To the best of Kay's knowledge, with the possible exception of Chris Killian, none of the complainants against Kay who were also competitors requested that their complaints be kept confidential.

[17] Indeed, the language used by Hollingsworth parrots the Commission rule implementing the FOIA. Section 0.461 of the Rules is entitled, "Requests for inspection of materials not routinely available for public inspection." 47 C.F.R. § 0.461.

The Bureau states that "[u]nless Kay expected the Bureau staff to break the law in order to accommodate his wishes, he had no right to expect further assurances." *Bureau's Sobel Opposition* at ¶ 29. But this is an overstatement. The "law" simply requires that the Commission release information that is not privileged or subject to an exception upon receipt of a valid FOIA request. Keep in mind that the Bureau was seeking a vast amount of information, including Kay's complete customer list. There is no law that would have prevented the Commission from narrowing the scope of its document request to Kay, to arrange for in camera inspection of the requested information, or to make other arrangements designed to alleviate Kay's justified and understandable confidentiality concerns. Moreover, when he received Hollingsworth's May 20, 1994, letter, Kay knew that the Bureau had already released the 308(b) request to his competitors who were using it against him, and he knew that Anne Marie Wypijewski ("Wypijewski"), a Bureau staff attorney, had already attempted to sabotage him by communicating behind his back with a party to a finder's preference proceeding in which Kay was involved. *See* Section II.D.2, below. The Bureau certainly did nothing to reassure Kay, and the actions that it did take make it clear that certain members of the Bureau staff had absolutely no intention of keeping the most important trade secrets of Kay's business from Kay's enemies.[18]

2. The Thompson Tree Incident

Wypijewski's efforts to harm Kay did not stop with merely sending blind copies of the 308(b) letter to Kay's enemies. She went so far as to engage in *ex parte* communications with a party to a contested proceeding involving Kay, providing the other party with valuable strategic inside information. Kay learned about this immediately after it happened, confirming once and

[18] Kay was well aware of the serious danger his enemies could do to his business when they identified his customers. Kay was already involved in a law suit, commenced in August of 1993, against Harold Pick for illegal acts committed by Pick to Kay's customers. Moreover, Kay was aware that Pick and other were already using the fact of the Section 308(b) request (which Wypijewski informed them of by sending blind copies) to defame Kay in the Los Angeles land mobile radio business community.

for all his suspicion of bad faith on the part of the Bureau, and vindicating his determination that it would have been competitive suicide to turn over his business information to the Bureau.

Ralph Thompson d/b/a Thompson Tree Service once held an authorization for Business Radio Service Station WIH275, authorizing operations on the frequency pair 508/511.1875 MHz at Sierra Peak in Corona (Riverside County) California. On September 20, 1993, Kay submitted a letter to the Commission requesting removal of the Thompson license from the database because of discontinuance. On December 23, 1993, Hollingsworth sent a letter to Thompson, advising him that "[t]the Commission has been informed that that [his] radio system may no longer be in operation," and directing him to respond within 20 days. Attachment 21 is a copy of that letter. On or about January 31, 1994, Kay submitted a finder's preference request pursuant to Section 90.173(k) of the Commission's Rules, demonstrating that Thompson had discontinued operation of the station for more than one year, thereby resulting in the automatic cancellation of the license pursuant to Section 90.157(a) of the Rules. The matter was assigned Compliance File No. 93L778.

Thompson did not respond to Hollingsworth's December 23, 1993, letter, and on March 29, 1994, Wypijewski wrote a second letter to Thompson, again requesting a response within 20 days. A copy of that letter is attached hereto as Attachment 22. Wypijewski did not serve a copy of the letter on Kay. This is significant in that Kay's finder's preference request should have been granted at that point. Kay had presented compelling evidence of abandonment by Thompson, and after nearly three months, Thompson had failed to respond to the Commission's request. Instead, Wypijewski, on an *ex parte* basis, wrote to Thompson giving him a second chance to respond. Allowing Thompson additional time to respond was within the scope of the Bureau's discretion, but initiating *ex parte* communications with a party to a contested matter is not. In fact, it is unlawful conduct, proscribed by Commission regulation.

On April 5, 1994, Thompson responded to the Wypijewski letter and served a copy of his response on Kay. On April 8, 1994, Kay initiated discussions with Thompson leading to an agreement whereby Kay would provide repeater service to Thompson and Thompson would voluntarily surrender his license for cancellation. On April 15, 1994, Thompson executed a formal repeater agreement with Kay and signed an FCC Form 405-A, surrendering his license call sign WIH275 for cancellation.

On or about April 18, 1994,[19] Wypijewski telephoned Gail Thompson, Ralph Thompson's wife. Attachment 23 is the sworn affidavit of Mrs. Thompson recounting that conversation. Wypijewski provided Mrs. Thompson with strategic inside information regarding the anticipated FCC disposition of matter. She effectively "coached" Thompson on how her husband could regain the authorization, knowing full well that the disposition of the authorization was a pending contested matter. Wypijewski advised Mrs. Thompson that the authorization was going to be canceled regardless of the finder's preference request, but she explained that the channel would then be "up for grabs" and that anyone, including Mr. Thompson, could file an application for it.

On April 22, 1994, call sign WIH275 was deleted from the Commission's database. On April 25, 1994, Wypijewski mailed a letter to Kay dismissing his finder's preference request on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request.[20] Kay received his service copy of this letter on April 28, 1994. On April 29, 1994, Wypijewski again telephoned Mrs. Thompson, but did not reach her and only left a message. Mrs. Thompson did not return the call, but it is obvious from the context that the

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[19] Although Mrs. Thompson's affidavit does not specify the date of this telephone call, Kay has placed it at April 18, 1994, because Mrs. Thompson called Kay immediately afterwards and advised him of her conversation with Wypijewski.

purpose of Wypijewski's April 29 call was to alert Mrs. Thompson that both the cancellation and the finder's preference request had been dismissed, and that the time was ripe for Mr. Thompson to re-file an application. With this kind of inside information, Thompson might well have been able to file an application and obtain an authorization before the general public even became aware of the opportunity. Thus, by means of illegal *ex parte* communications, Wypijewski attempted to give Thompson what, as a practical matter, was the finder's preference she had just denied Kay.

The Bureau argues that it was independently investigating Thompson Tree's possible nonconstruction, that the Hollingsworth letter and the Wypijewski follow-up had nothing to do with the finder's preference request, but was a follow-up on the Bureau's "independent" investigation of Thompson Tree. *Bureau's Sobel Opposition* at ¶ 32. But the investigation was not "independent." It was prompted by a letter from Kay dated September 18, 1993, and directed specifically to the attention of Wypijewski. Thus, as the one who filed the "complaint," Kay was very much a party-in-interest with respect to the investigation. Hollingsworth of course did not serve Kay with a copy of his December 23, 1993, letter. Compare this to the Bureau's dissemination of six blind copies of the 308(b) letter to Kay. Thus, the Bureau's claim that it "routinely provides complainants with information concerning the status of investigations," *Bureau's Sobel Opposition* at ¶ 30, is apparently another one of those things that is true only for parties other than Kay--or it is yet another Bureau statement that is *not* true.

In any event, assuming arguendo that Wypijewski was calling about the so-called "independent" investigation, her communications with Thompson Tree had a very direct bearing (and intentionally so) on Kay's pending finder's preference request. Indeed, Wypijewski

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[20] The Bureau's denial of Kay's finder's preference request on the grounds of an independent investigation is another example of its negative animus toward Kay. The so-called "independent" investigation was actually the result of Kay's September 20, 1993, letter that had been sent as a prelude to his finder's preference request.

specifically discussed the finder's preference request in the conversation, confirming her own understanding that there was a connection between the two. Whether or not this fits precisely within the four corners of the applicable *ex parte* regulations, it can not be denied that it is highly improper for a Bureau staff member to take sides in a licensing matter, specifically providing unsolicited advice to one party how to strategically outmaneuver the other. Yet, that is precisely what Wypijewski did.[21]

By engaging in communications with and providing inside information to Mrs. Thompson, Wypijewski not only violated the spirit and the letter of the Commission's *ex parte* rules, she also attempted, perhaps intentionally, to interfere with Kay's contractual relationship with Thompson. Wypijewski's conduct is unbecoming of an ostensible public servant, and is inexcusable.

3. The Pro Roofing Incident

Hollingsworth, or persons acting under his direction, apparently interfered with a legitimate attempt by Kay to press criminal charges against the perpetrator of a theft of service against Kay's repeater company.

On December 14, 1995, Kay discovered that a company called Pro Roofing was operating mobile units that had been programmed, without Kay's knowledge or consent, to operate on Kay's conventional SMRS Station WNYR747. When Kay investigated further he learned that Harold Pick d/b/a Century Communications had programmed approximately seven or eight units for Pro Roofing to operate on Kay's repeater. Attachment 24 is a copy of

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[21] The Bureau makes the fantastic argument that Kay has no basis to complain about Wypijewski's April 29 attempt at a further *ex parte* contact with Thompson Tree because his finder's preference request had been denied on April 25, 1998. *Bureau's Sobel Opposition* at 32. This argument fails on two counts. First, it utterly ignores the successful *ex parte* contact on April 18, 1994, while Kay's finder's preference request was still pending. Second, the prohibition on *ex parte* communications did not end with the dismissal of Kay's finder's preference request. Kay had until at least June 25, 1994 to seek reconsideration or review of the Bureau's action, and the *ex parte* restrictions continued during that period.

December 14, 1995, letter from Kay to the FCC field office in Cerritos, California, asking them to investigate the matter. The Commission apparently took no action in response to Kay's letter, and the only acknowledgment came eight month's later Kay received a fax message from James LaFontaine, then a Commission employee stationed at the Cerritos field office, simply asking Kay if "this problem [is] still occurring." Attachment 26 at p. 1.

Further details regarding this matter are set forth in Attachment 26 (the sworn declaration of Marc Sobel) and Attachment 27 (a private investigation report prepared for Kay). It is conclusively shown that Harold Pick was responsible for the intentional programming of the Pro Roofing radios for unauthorized access to Kay's repeater. Attachment 28 contains documents further corroborating this. An invoice from Century Communications Services, Pick's company, indicates that Pick had visited Pro Roofing on November 17, 1995, to install radios. Attachment 28 at p. 1. A copy of Harold Pick's business card was obtained from Marvin Han, General Manager of Pro Roofing. *Id.* at p. 2. Pick thus programmed the radios of his customer, Pro Roofing, to operate on Kay's repeater. In essence, he was selling air time on Kay's repeater without Kay's knowledge or consent, and keeping the proceeds. This is (or should have been) an open-and-shut case of theft of service. The law enforcement authorities refused to pursue the matter, and it appears that communications from FCC personnel in Gettysburg, Pennsylvania may have been responsible for this.

Attachment 29 is a copy of the police report in this matter. It will be noted that Pick told the investigating officer he was "getting assistance from the FCC" regarding this matter. *Id.* at 3. The report further discloses that the investigating officer called the FCC in Gettysburg and was that "the FCC is aware of the problem and they are investigating." *Id.* But that is not all the Gettysburg staff said to the Los Angeles police regarding this matter. Attachment 30 is a copy of a private investigation report prepared for Kay. It indicates that Detective Martinez of the L.A.P.D. Wilshire Division, contacted the FCC in Gettysburg and, in addition to being advised

that Kay was under FCC investigation, was "provided ... with certain confidential information." While both the police report and the private investigation report say that the contact person at the FCC was Sharon Bowers, Chief of the Wireless Telecommunications Bureau's Informal Complaints & Public Inquiry Branch, it is extremely unlikely that she would have released confidential information regarding the investigation of James Kay without the knowledge and approval, if not the directive, of Hollingsworth who was at the time actively involved in the prosecution of the Kay revocation hearing.

The investigating officer advised Joel S. Wyenn, the private investigator pursuing the matter on Kay's behalf, that the case was not being pursued because they felt it was more properly a civil matter. But this is curious. Consider what Pick did in selling repeater airtime to a customer he surreptitiously placed on Kay's repeater. To understand this, translate it into the equivalent scam on a cellular system. One holds himself out as a reseller of cellular service, but actually provides customers with illegally cloned phones. In this case the "reseller" is selling stolen airtime. It is simply not credible to believe that law enforcement officials would not pursue a criminal prosecution of such a scheme. Yet that is precisely what Pick was doing, and they dismissed it as a "civil" matter. This excuse is further contradicted by the fact that such practices in fact are criminally prosecuted in Los Angeles. *See, e.g.*, Criminal Case No. 91W08328, West Los Angeles, in which one Richard Chaidez was charged with theft of "the personal property of another ... to wit, RADIO FREQUENCY." In a subsequent criminal proceeding Mr. Chaidez was charged with "willfully and unlawfully take ... REPEATER USAGE FEE ... the property of KHM Communications."

It is thus clear that Los Angeles law enforcement officials in fact do not consider theft of a licensee's airtime to be a purely civil matter; rather, it is criminally prosecuted. The evidence that Pick engaged in theft of service from Kay is extremely compelling, but the police and/or prosecutors are not pursuing the matter. It appears very likely that their inaction on this matter is